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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-460

EDGAR SANCHEZ,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of the Case

While attempting to flee on foot from two police officers who had stopped his car, petitioner discarded in view of the pursuing officers a tinfoil ball containing 66 packets of cocaine and five packets of heroin. The ball was immediately recovered by one of the policemen and petitioner was soon thereafter apprehended and arrested. Petitioner was indicted and charged with the crimes of Criminal Possession of a Controlled Substance in the Fifth and Seventh Degrees (N.Y. Penal Law §§ 220.09 and 220.05).

Petitioner subsequently made a motion for a hearing to suppress physical evidence. That motion was denied, with leave to petitioner to renew the motion upon a proper showing of issues of fact. Petitioner was tried by a jury

and convicted of both charges against him. Petitioner was sentenced to an indeterminate term of imprisonment not to exceed three years for fifth degree possession and to a definite sentence of one year for seventh degree possession, both sentences to run concurrently. The judgment against petitioner was affirmed without opinion in the Appellate Division, First Department, of the New York Supreme Court, and leave for a further appeal to the New York Court of Appeals was denied.

In his petition for certiorari, petitioner asks that this Court review whether the police officers who stopped his car violated his Fourth Amendment rights. Petitioner also asks this Court to determine whether his rights were violated by a State procedural rule which provides that a defendant must set forth sworn allegations of fact making out a Fourth Amendment violation before he is entitled to a suppression hearing.

The Motion to Suppress

Prior to trial, petitioner filed an omnibus motion* which included a request for a pre-trial hearing to determine whether any "tangible personal property" obtained by the police should be suppressed because obtained by an unlawful search and seizure. The affirmation of petitioner's attorney attached to the notice of motion failed to set forth any factual allegations concerning the circumstances surrounding petitioner's arrest or the recovery of the drugs which formed the basis for the indictment. The People opposed petitioner's motion for a hearing on two grounds: (1) the motion papers did not set forth any factual allega-

* Petitioner's motion papers are set forth as an appendix to this brief.

tions raising the issue of a possible Fourth Amendment violation; and (2) petitioner failed to comply with the requirements of N.Y. CPL Section 710.60, in that the motion papers contained no sworn allegations of fact.

In New York, CPL Section 710.60 governs the procedure to be followed with respect to motions to suppress evidence which the prosecution intends to introduce in a criminal case. It provides, in pertinent part, as follows:

> "§ 710.60 Motion to suppress evidence; procedure.
>
> "1. A motion to suppress evidence made before trial must be in writing and upon reasonable notice to the people and with opportunity to be heard. The motion papers must state the ground or grounds of the motion and must contain sworn allegations of fact whether of the defendant or of another person or persons, supporting such grounds. Such allegations may be based upon personal knowledge of the deponent or upon information and belief, provided that in the latter event the sources of such information and the grounds of such belief are stated. The people may file with the court, and in such case must serve a copy thereof upon the defendant or his counsel, an answer denying or admitting any or all of the allegations of the moving papers.
>
> "* * *
>
> "3. The court may summarily deny the motion if:
>
> (a) The motion papers do not allege a ground constituting legal basis for the motion * * *"

Petitioner's motion papers failed to allege a single fact concerning his arrest or the recovery of the narcotics used in evidence against him. Petitioner merely requested that a pre-trial suppression hearing be held without the slightest suggestion that his rights were in any way violated by

the police. Justice Goodman therefore filed an order denying petitioner's motion because there were "no facts raised by the defense to warrant a suppression of evidence" (Pet. A. 1a).* Given such an entirely deficient presentation, the court had little choice but to deny the motion summarily without a hearing pursuant to CPL § 710.60(3). *See People* v. *Glen,* 30 N.Y.2d 252, 262, 331 N.Y.S.2d 656, 664, *cert. denied,* 409 U.S. 849 (1972); *People* v. *Solimine,* 18 N.Y.2d 477, 276 N.Y.S.2d 882 (1966); *People* v. *Leonard,* 33 App. Div. 2d 1010, 308 N.Y.S.2d 77 (1st Dep't), *aff'd,* 27 N.Y.2d 959, 318 N.Y.S.2d 496 (1970).

However, leave was granted to petitioner to renew the motion "upon a proper showing of issues of fact" (Pet. A. 1a). At no time prior to or during the trial did petitioner attempt to avail himself of the opportunity to renew the motion to suppress by submitting proper motion papers. Indeed, at trial, petitioner's counsel specifically rejected a renewal of the suppression motion after learning of the basis upon which the police stopped petitioner's car (T. 7-8; 180-81; 182; 186-87).** Under these circumstances, petitioner waived any right he might have had to a suppression hearing. CPL § 710.70(3). *See People* v. *Esajerre,* 35 N.Y.2d 463, 363 N.Y.S.2d 931 (1974); *People* v. *Berrios,* 28 N.Y.2d 361, 367, 321 N.Y.S.2d at 884, 888 (1971).

THE EVIDENCE AT TRIAL

The People's Case

On January 13, 1977, at approximately 2:00 p.m., three New York City police officers assigned to the Anti-Crime Unit of the 5th Precinct in Manhattan were sitting in an

* "Pet. A." citations refer to pages of petitioner's appendix.

** Numbers preceded by "T." refer to the minutes of the trial.

unmarked police car parked in lower Manhattan (Mauriello: T. 33; Forzano: T. 136-37). The officers, dressed in civilian clothes, proceeded to follow a white Grand Prix Pontiac driven by petitioner in which petitioner's father, Raphael Sanchez, was a passenger (Mauriello: T. 34; Forzano: T. 137). They made the decision to follow petitioner based on information personally supplied to two of the officers, Sergeant Forzano and Officer Murnane, less than an hour earlier by an informant known to them* that a male Puerto Rican, driving a white Grand Prix Pontiac with a black top, was carrying a gun (Forzano: T. 150-57; 166-67). After following petitioner's car for several blocks, the driver of the police car obtained petitioner's attention by sounding the horn. Sergeant **Salvatore Forzano** then exhibited to petitioner a police department shield and directed petitioner to pull his car over to the curb (Mauriello: T. 34-35; Forzano: T. 137). After the cars came to a stop, Detective **Neil Mauriello** exited the police car, walked over to the driver's side of petitioner's car, identified himself as a police officer and asked petitioner for his license and registration. Petitioner handed these items to Mauriello and then stood outside of the car while the detective examined them (Mauriello: T. 35; Forzano: T. 137-38).

As Detective Mauriello made a motion toward petitioner with the intention of frisking him for weapons, petitioner immediately bolted and began running down the street (Mauriello: T. 36; Forzano: T. 138). Mauriello and Forzano took up the chase while Murnane stayed behind with Raphael Sanchez. Running behind petitioner, Forzano saw

* Petitioner incorrectly states in his petition that the informant was anonymous. Petition at 5, 8. Sergeant Forzano testified that the informant gave his information concerning petitioner in the presence of both Forzano and Officer Murnane and that the informant was known to Murnane from a previous encounter (T. 150-53).

petitioner reach into his right pocket, remove a softball-sized, round aluminum object and throw it to the ground (Forzano: T. 138-39). Forzano did not stop but instead continued the chase (Forzano: T. 140). Mauriello, who was close behind Forzano, retrieved the discarded object and then renewed his pursuit of petitioner (Mauriello: T. 37-38, 103). Finally, Forzano caught up with petitioner and placed him under arrest. The tinfoil ball was later found to contain 66 packets of cocaine and 5 packets of heroin (T. 114-125).

The Defendant's Case

Petitioner testified on his own behalf. He stated that after he was stopped by the police he showed his license and registration to Detective Mauriello, who then demanded that petitioner give him "the gun" or else he would beat him (Edgar Sanchez: T. 203). He testified that he then ran because he was afraid of being beaten and that he saw a "silver package" for the first time in the precinct station after his arrest (Edgar Sanchez: T. 205, 211).

Edwin Rivera, an acquaintance of petitioner and his family, testified that on January 13, 1977, he saw petitioner running down the street pursued by two men close behind (Rivera: T. 189-191). He testified that he did not see either of the two pursuers with a tinfoil ball but admitted that he did not have a continuous view of the chase (Rivera: T. 194, 198-99).

Raphael Sanchez testified that he was in the car with his son. He saw petitioner show his license and registration to the plainclothes officer and then saw him run away (Raphael Sanchez: T. 215-17).

The Appeal

On appeal to the Appellate Division, First Department, of the New York Supreme Court, petitioner argued that a hearing should be ordered to determine whether the police stopped his car in violation of his constitutional rights. He contended that his admitted failure to comply with CPL Section 710.60 was excusable because he did not know the basis upon which the police stopped his car until mid-trial. He did not contend that CPL Section 710.60 was unconstitutional or that it did not serve any legitimate State purpose. The Appellate Division unanimously affirmed petitioner's conviction without opinion on May 10, 1979 (Pet. A. 2a-3a). The Honorable Sol Wachtler, Associate Judge of the New York Court of Appeals, denied leave to appeal to that Court on June 22, 1979 (Pet. A. 4a).

POINT I

This Court lacks jurisdiction to review the questions presented by the petition. In any event, those questions present no issue deserving of review in this Court.

Petitioner moved prior to trial for a hearing to determine whether physical evidence obtained from him at the time of his arrest should be suppressed. This motion was denied because petitioner failed to comply with N.Y. CPL Section 710.60 in that his motion papers did not raise any issues of fact. At trial, petitioner expressly declined to renew his motion although given the opportunity to do so. Under established New York law, he thereby waived any right he might have had to a suppression hearing. CPL § 710.60(3). *See, People* v. *Esajerre,* 35 N.Y.2d 463, 363

N.Y.S.2d 931 (1974); *People* v. *Berrios,* 28 N.Y.2d 361, 367, 321 N.Y.S.2d 884, 888 (1971).

Petitioner now asks this Court to consider whether his car was illegally stopped and an illegal attempt was made to search him. He also asks review of the validity of New York's rule that he was not entitled to a suppression hearing in the absence of sworn factual allegations making out a Fourth Amendment violation. For neither question is there jurisdiction in this Court. In any event, review of these questions would not serve the purposes of certiorari jurisdiction.

Under 28 U.S.C. Section 1257(3), invoked by petitioner herein, this Court has jurisdiction to review only Federal questions actually passed upon by State courts. If a petitioner failed to raise a Federal question in the State courts, *see, Bailey* v. *Anderson,* 326 U.S. 203, 206-07 (1945), or if the question may not have been decided because of the presence of an adequate and independent State ground for the decision, *see, Fox Film Corp.* v. *Muller,* 296 U.S. 207 (1935), review in this Court is barred. Thus, a petitioner who asks this Court to review the judgment of a State court must demonstrate that the State court ruling rested on Federal grounds. *Street* v. *New York,* 394 U.S. 576, 581-82 (1969); *Stembridge* v. *Georgia,* 343 U.S. 541, 547-48 (1952). Where "it appears that the judgment [of the State court] *might* have rested on a nonfederal ground," this Court will not review the judgment. *Stembridge* v. *Georgia,* 343 U.S. at 547, *supra* (emphasis in original). To give effect to this requirement, the rules of this Court require one who petitions for certiorari to state "the way in which [the federal questions] were passed upon by the [State] court." Supreme Court Rules, Rule 23(1)(f). This, petitioner has failed to do.

In the instant case, petitioner's Fourth Amendment claim need not have been decided in the New York courts, because of the existence of an independent procedural ground for affirming his conviction. In fact, there is every indication that the Fourth Amendment claim was not passed upon. At both the pretrial proceeding and trial, the New York courts expressly declined to rule on the Fourth Amendment claim because of petitioner's failure to comply with the procedural statute.

In his appeal to the Appellate Division, petitioner argued that, under the particular circumstances of his case, the New York procedural rule should not have been applied by the lower courts. The Appellate Division affirmed the conviction without opinion. In doing so, the Appellate Division may have rejected petitioner's procedural argument; there is no suggestion that petitioner's Fourth Amendment claim was considered on the merits by the court. That being the case, review in this Court of the legality of petitioner's arrest and seizure of the drugs is foreclosed by the presence of an adequate, independent State procedural ground. *See, Michigan* v. *Tyler,* 436 U.S. 499, 512 n.7 (1978); *Monger* v. *Florida,* 405 U.S. 958 (1972) (order denying cert.); *Henry* v. *Mississippi,* 379 U.S. 443 (1965). *Cf. Wainwright* v. *Sykes,* 433 U.S. 72 (1977). Petitioner does not claim that New York's procedural rule serves no legitimate purpose, *see Henry* v. *Mississippi, supra* at 447. Such a claim would clearly be frivolous since there is a patent benefit in conducting hearings to determine the admissibility of evidence only where the facts present a serious Fourth Amendment issue.

Nor is there jurisdiction to review petitioner's constitutional challenge to New York's procedural rule. Petitioner appears to argue that the provisions of CPL Section

710.60 are unconstitutional. Petitioner never made this argument in the New York courts, however. Instead, he merely claimed that in the particular circumstances of his case, compliance by him with CPL Section 710.60 should not have been required. He did not claim that the procedural bar in any way abridged his Federal rights. Therefore, no jurisdiction exists to review this constitutional challenge raised for the first time in this Court. *Street* v. *New York, supra.*

In any event, this Court's review of the Fourth Amendment claim or the claim that CPL Section 710.60 is unconstitutional would not serve the purposes of certiorari. Apart from the well-established rules governing frisks of suspects, petitioner's Fourth Amendment claim involves only an issue of law definitively resolved by the Court in *Delaware* v. *Prouse,* 99 S. Ct. 1391, 1401 (1979) just last term. That case involved the issue of Federal law applicable to automobile stops based on less than probable cause. The *Prouse* rule is and has been the law in New York for some years. *People* v. *Sobotker,* 43 N.Y.2d 559, 563-64, 402 N.Y.S. 2d 993, 995-96 (1978); *People* v. *Ingle,* 36 N.Y.2d 413, 419, 369 N.Y.S.2d 67, 73-74 (1975). There is no reason to grant certiorari to determine whether the particular fact pattern in this case falls within the guidelines set in frisk cases and in *Prouse* even if there were jurisdiction to do so. In fact, petitioner's failure to raise the issue below in accordance with New York's procedural rule means that it is quite likely that the present record does not contain all of the relevant facts.

Petitioner's constitutional challenge to the New York procedural statute likewise is not deserving of review. The New York requirement that a defendant raise an issue of

fact in his motion papers before he is entitled to an evidentiary hearing on a motion to suppress is in substance the rule long applied in and approved by the Federal courts. *See, e.g., United States* v. *Culotta,* 413 F.2d 1343, 1345 (2d Cir. 1969), *cert. denied,* 396 U.S. 1019 (1970); *Cohen* v. *United States,* 378 F.2d 751, 760-61 (9th Cir.), *cert. denied,* 389 U.S. 897 (1967); Wright, *Federal Practice and Procedure*: Criminal § 675, pp. 125-26 (1969). Nor can there be a serious question about whether a State may give conclusive effect to a defendant's failure to comply with such a rule. *See Wainwright* v. *Sykes,* 433 U.S. 72 (1977). Finally, there can be no serious issue about whether the procedural rule was unfair as applied to this petitioner. Petitioner had every opportunity to make a proper motion, including an opportunity to renew his motion in satisfactory form at trial after learning of the basis for the police action of which he now complains. Petitioner chose not to do so.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT M. MORGENTHAU
District Attorney
New York County

MARK DWYER
Assistant District Attorney

MICHAEL E. NORTON
Special Assistant District Attorney

Of Counsel

November, 1979

APPENDIX

Notice of Motion

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK—SPECIAL NARCOTICS PART

Indictment #N1433/77

THE PEOPLE OF THE STATE OF NEW YORK

against

EDGAR SANCHEZ,

Defendant.

SIRS:

PLEASE TAKE NOTICE that upon the annexed affirmation of KENNETH J. SCHREIBER, and upon all the pleadings and proceedings heretofore had and filed herein, the undersigned will move this Court at a Special Narcotics Part of the Supreme Court, County of New York, Part E, located at 111 Centre Street, New York, New York on the 2nd day of June, 1977 at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an Order in the following form:

1. Granting inspection of Grand Jury minutes and dismissing the indictment herein upon the grounds that the evidence adduced before the Grand Jury was not legally

sufficient pursuant to Section 210.30 of the Criminal Procedure Law;

2. Granting production of a full and complete copy of each and all statements alleged to have been made by the defendant to law enforcement agencies or authorities, in accordance with Section 240.20 (1) (b), Criminal Procedure Law;

3. Granting production of each and all items, statements, records, evidence, and leads to evidence in the possession or within the custody or control of the District Attorney, his agents, and employees, which may be useful for the defense of the charge herein, or in the mitigation of punishment.

4. Granting a Bill of Particulars and Discovery as to the following items, in accordance with Sections 200.90 and 240.20 Criminal Procedure Law.

(a) Set forth the approximate time and location where the defendant was arrested.

(b) Set forth a copy of all scientific reports relating to the contraband that was recovered.

(c) Set forth whether or not the drugs in question were recovered from the defendant; and if not, set forth where the drugs were allegedly recovered from.

(d) A specification of the date, time, place and length of time when the defendant was questioned by law enforcement authorities, after the defendant's arrest, together with the name and shield number of each interrogating

officer, whether or not any statement or admission was obtained.

(e) A copy of any written or recorded statement, confession and/or admission made by the defendant to the District Attorney or any other law enforcement officers.

(f) The names and addresses of anyone present at the scene of the alleged crime.

5. Granting a hearing, pretrial, for the suppression of (1) each and all items of evidence consisting of tangible personal property which was obtained by means of an unlawful search and seizure under circumstances precluding its admissibility pursuant to Section 710.20 (1) and (4) Criminal Procedure Law; (2) each and all items consisting of a record or potential testimony reciting or describing declarations or conversations overheard and/or recorded by means of eavesdropping, under circumstances precluding its admissibility pursuant to Section 710.20 (2) and (4) Criminal Procedure Law; (3) any and all evidence consisting of a record or potential testimony reciting or describing a confession or statement alleged to have been made by any defendant under circumstances casting doubt upon its voluntariness and lawfulness to any person engaged in law enforcement activities, and other evidence obtained in pursuance of such statement of confession all in accord with Section 710.20 (3) and (4) Criminal Procedure Law; and (4) each and all items of potential testimony which purports to identify the defendant as the perpetrator of the crimes charged in the indictment; owing to improperly made previous identification by the particular potential witness, all in accordance with Section 710.20 Criminal Procedure Law.

PLEASE TAKE FURTHER NOTICE that pursuant to Section 240.40 Criminal Procedure Law, this motion requires the District Attorney to continue to promptly disclose any and all additional items, matters or property which may be discovered subsequent to the return date of this motion.

Dated: Queens, N.Y.—May 24, 1977

Yours, etc.

KENNETH J. SCHREIBER
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Kew Gardens, New York 11415
Tel. #212-793-2700

To:

HON. ROBERT M. MORGENTHAU
District Attorney, New York Co.
155 Leonard Street
New York, New York

Attorney's Affirmation

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK—SPECIAL NARCOTICS PART

THE PEOPLE OF THE STATE OF NEW YORK

against

EDGAR SANCHEZ,

Defendant.

KENNETH J. SCHREIBER, an attorney duly admitted to practice in the Courts of the State of New York, hereby affirms the following under the penalty of perjury:

1. That I am the attorney for the above named defendant.

2. This affirmed statement is submitted in support of defendant's motion for various forms of relief. For purposes of clarity, the statement will be subdivided into the different areas of relief requested as set forth in the Notice of Motion.

3. The defendant was indicted on the following charge: Criminal Possession of a Controlled Substance in the Fifth Degree and Criminal Possession of a Controlled Substance in the Seventh Degree under indictment #N1433/77.

4. This defendant was arraigned and entered a plea of NOT GUILTY.

5. It is the affirmant's belief that the evidence presented to the Grand Jury did not establish the pre-arraignment intention to sustain the charges under Indictment #N1433/77.

6. Based upon your affirmant's investigation and interview with the defendant, and the facts underlying the charge, and a review of the applicable law, all of which constitute the basis for my information and belief.

7. That upon information and belief, based on the aforesaid investigation, the People have failed to make out a case of Criminal Possession of a Controlled Substance in the Fifth Degree and Criminal Possession of a Controlled Substance in the Seventh Degree.

8. It is therefore requested in Number 1 of the Notice of Motion that the Court grant to the defendant the right to inspect the Grand Jury minutes and dismiss the indictment herein on the grounds that the evidence adduced before the Grand Jury was not legally sufficient pursuant to Section 210.30 of the Criminal Procedure Law.

9. It is clear with the passage of Section 240.20 (1) (b), Criminal Procedure Law, that defendant is entitled, as a matter of right, to a full and complete copy of any and all statements of authorities, in HAEC VERBA if they are recorded and exist, or in substance. I ask for enforcement of this right.

10. Since the decision in *Brady* v. *Maryland,* 373 U.S. 83, the law is clear that the defense is entitled to have the District Attorney search his file and turn over each and all items, leads, evidence or other matters which, in and of themselves, may be helpful to the defense, or which may lead to other items or matters helpful to the defense.

11. The Bill of Particulars is essential in order to enable defendant adequately to prepare and conduct his defense and to preserve due process of law. All of these items pertain directly to the charge at hand, are sought in good faith in aid of making a meaningful and informed defense to this serious charge and can be supplied at no cost, in terms of prejudice, to the People.

12. Section 240.20 Criminal Procedure Law warrants the grant of the discovery items sought in the annexed Notice of Motion.

13. The balance of the motion deals with the various pretrial hearings provided for by the Criminal Procedure Law for the suppression of various kinds of evidence. They depend, to some extent, upon the responses of the People to earlier branches of this motion, and I submit, should be granted to the extent of directing the hearings sought.

WHEREFORE, based upon all of the foregoing, I respectfully pray that the motions set forth in the annexed Notice of Motion be granted in behalf of the defendant.

Dated: May 24, 1977
Queens, New York

KENNETH J. SCHREIBER